

APPEAL NO. 170415
FILED APRIL 13, 2017

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 12, 2017, in (city), Texas, with (hearing officer) as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) Mr S. (decedent) did not sustain a compensable occupational disease on (date of injury), which resulted in his death; (2) Ms S. (claimant beneficiary 1), Mr S. Jr. (claimant beneficiary 2), and Kadarian Martin (claimant beneficiary 3) are proper legal beneficiaries of the decedent but are not entitled to death benefits because the claim is not compensable; and (3) because the claim is not compensable, respondent 1 (carrier) is relieved from liability for death benefits under Section 409.007.

Claimant beneficiary 1 appealed the hearing officer's decision arguing that the evidence supports a determination that the decedent sustained a compensable occupational injury on (date of injury), which resulted in his death. The carrier responded, urging affirmance. The appeal file does not contain a response from claimant beneficiary 2 or claimant beneficiary 3.

The hearing officer's determination that claimant beneficiary 1, claimant beneficiary 2, and claimant beneficiary 3 are proper legal beneficiaries of the decedent was not appealed and has become final pursuant to Section 410.169.

DECISION

Affirmed as reformed.

It was undisputed that the decedent died on June 11, 2012, due to widespread lung cancer.

The hearing officer's determination that the decedent did not sustain a compensable occupational injury on (date of injury), resulting in his death is supported by sufficient evidence and is affirmed.

In Finding of Fact No. 7, the hearing officer stated:

7. [Claimant beneficiary 3] is the biological child of [the] [d]ecedent, born on February 16, 2014.

We note, however, that a copy of the birth certificate of claimant beneficiary 3 in evidence establishes that the correct date of birth is

February 16, 2012. Accordingly, we reform Finding of Fact No. 7 as follows:

7. [Claimant beneficiary 3] is the biological child of [the] [d]ecedent, born on February 16, 2012.

In evidence is a Notice of Fatal Injury or Occupational Disease and Claim for Compensation for Death Benefits (DWC-42) claiming death benefits for each of the claimant beneficiaries. Although no evidence was offered concerning the date of filing with the Texas Department of Insurance, Division of Workers' Compensation (Division), the DWC-42 is dated April 8, 2016, a date more than three years following the date of the decedent's death. A second DWC-42 prepared only on behalf of claimant beneficiary 3 is also in evidence. No evidence was offered concerning the date the second DWC-42 was filed with the Division; however, the form was signed on July 28, 2016, a date more than four years following the date of the decedent's death.

Section 409.007 provides in pertinent part that:

- a. A person must file a claim for death benefits [DWC-42] with the [D]ivision not later than the first anniversary of the date of the employee's death.
- b. Failure to file in the time required by Subsection (a) bars the claim unless:
 - 1. the person is a minor or incompetent; or
 - 2. good cause exists for the failure to file a claim under this section.

Pursuant to Section 409.007(a), a DWC-42 must be filed by the first anniversary of the decedent's death, which in this case was June 11, 2013. However, the evidence established that as of the first anniversary of the decedent's death, claimant beneficiary 2 and claimant beneficiary 3 were both minor children and pursuant to Section 409.007(b), their failure to file a DWC-42 not later than the first anniversary date of the decedent's death does not bar their claims.

In her Conclusion of Law No. 7, and in her decision, the hearing officer stated:

Because this claim is not compensable, [the] [c]arrier is relieved from liability for death benefits to [claimant beneficiary 1], [claimant beneficiary 2], and [claimant beneficiary 3] under [Section] 409.007.

Because the evidence established that both claimant beneficiary 2 and claimant beneficiary 3 were minor children as of the date of the CCH, we strike that portion of the hearing officer's Conclusion of Law No. 7 and Decision which determine that the carrier is relieved from liability for death benefits to claimant beneficiary 2, and claimant beneficiary 3 under Section 409.007.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RICHARD J. GERGASKO, PRESIDENT
6210 HIGHWAY 290 EAST
AUSTIN, TEXAS 78723.**

K. Eugene Kraft
Appeals Judge

CONCUR

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge